Supreme Court, U.S.
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No. 99-989

In The

Supreme Court of the United States

HAROLD M. ARMSTRONG,

and

CARL E. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS BRIEF OF THE STATES OF MINNESOTA, MICHIGAN, AND MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners challenge National Park Service jurisdiction over navigable waters owned by the State of Minnesota within the boundaries of Voyageurs National Park. Minnesota maintains that state jurisdiction over the waters has never been ceded to the federal government for national park purposes.[1] The question presented is:

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[1] The State's position is unequivocably stated in Minn. Stat. § 84B.061 which provides as follows:

> **84B.061 STATE JURISDICTION OVER RAINY LAKE AND OTHER NAVIGABLE WATERS; DUTIES OF GOVERNOR, ATTORNEY GENERAL, AND OTHER PUBLIC OFFICERS.**
>
> As required by this chapter and the act of Congress authorizing Voyageurs National Park, the state of Minnesota donated in excess of 35,000 acres of state and other publicly owned land for the park, roughly one-fourth of the land area of the park, at a cost of over $5,000,000 to the state. More than 24,000 acres of this land was state trust fund land which the state condemned before making its donation. Pursuant to section 84B.06, lands donated by the state, along with other lands acquired by the National Park Service for the park, were made subject to concurrent jurisdiction by the state and the United States under section 1.041. In making these donations, none of the navigable waters within the park and the lands under them have been donated to the United States. These navigable waters include the following: Rainy, Kabetogama, Namakan, Sand Point and Crane lakes. Pursuant to applicable federal and state law, navigable waters and their beds are owned by the state. Ownership of and jurisdiction over these

QUESTION PRESENTED – Continued

Whether, in the absence of state donation of property interests in navigable waters or express state cession of jurisdiction over those waters, a state may be stripped of its sovereign jurisdiction over state-owned navigable waters, by judicial implication, when those waters have been included within the exterior boundaries of a national park.

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waters and their beds has not been ceded by the state, either expressly or implicitly, to the United States. *Unlike section 1.044 relating to the Upper Mississippi Wildlife and Fish Refuge, where the state expressly granted its consent and jurisdiction to the United States to acquire interests in water, as well as land, the consent granted by the state in section 84B.06 to acquisitions by the United States for Voyageurs National Park is limited to land only.* In the discharge of their official duties, the governor, attorney general, other constitutional officers, and other public officials, such as the commissioner of natural resources, shall vigorously assert and defend, in all forums, the state's ownership of and jurisdiction over these waters and their beds and related natural resources, together with associated rights of the state and its citizens arising from the state's ownership and jurisdiction. In discharging their duties, the governor, attorney general, other constitutional officers, and other public officials shall, additionally, be especially cognizant of the free rights of travel afforded to citizens of Minnesota and by others under the Webster-Ashburton Treaty (proclaimed November 10, 1842) and the Root-Bryce Treaty (proclaimed May 13, 1910) on international and associated boundary waters. . . . (emphasis added). (Enacted as Minn. Laws 1995, Chapter 124, Sec. 2.)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

INDEX TO APPENDIX v

TABLE OF AUTHORITIES vi

INTEREST OF AMICI 1

STATEMENT OF FACTS 2

A. THE ESTABLISHMENT OF VOYAGEURS NATIONAL PARK 2

B. PRESENT DISPUTE 4

REASONS FOR GRANTING THE WRIT 5

I. Important Issues Of State Sovereignty Regarding Jurisdiction Over Navigable Waters Are Raised In This Case 5

A. Jurisdiction Over Navigable Waters Is A Fundamental Aspect Of State Sovereignty 5

B. Title To The Land And Navigable Water Vested In The State At Statehood 6

C. Absent State Donation Of Its Interests In Waters Within The Exterior Boundaries Of Voyageurs National Park, Exercise Of Jurisdiction Over These Waters By The National Park Service Has No Foundation In The Property Clause Of The United States Constitution 8

TABLE OF CONTENTS – Continued

Page

D. The State Has Not Ceded Jurisdiction Over Waters In The Park 13

E. The State's Sovereign Interests In Waters Within Voyageurs National Park Are Protected By The Tenth Amendment 15

CONCLUSION 19

AMICUS MINNESOTA'S INDEX TO APPENDIX

Page

Comments on Voyageurs National Park Draft Master Plan and EIS.....App. 1-3

TABLE OF AUTHORITIES

Page

Federal Cases

Adams v. United States, 319 U.S. 312 (1943) 10

Alden v. Maine, ___ U.S. ___, 119 S. Ct. 2240 (1999) 17

Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981) ..11, 14

College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd., ___ U.S.___, 119 S. Ct. 2219 (1999) 18

Colorado v. Toll, 268 U.S. 228 (1925) 8, 9, 10, 11, 12

Gregory v. Ashcroft, 501 U.S. 452 (1991).....17, 18

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 7

Kansas v. Colorado, 206 U.S. 46 (1907)..... 10, 11, 12

Kleppe v. New Mexico, 426 U.S. 529 (1976) 11

Lessee of Pollard v. Hagan, 3 How. 212 (1845) 6

Martin v. Lessee of Waddell, 16 Pet. 367 (1842)..... 6

New York v. United States, 505 U.S. 144 (1992) 12, 15, 16, 17

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977). 6

Printz v. United States, 521 U.S. 898 (1997)..... 17

United States of America v. Harold M. Armstrong and Carl E. Brown, 186 F.3d 1055 (8th Cir. 1999)..... 5

United States v. Brown, 552 F.2d 817 (8th Cir. 1977)..... 7, 11, 14

United States v. Brown, 431 F. Supp. 56 (D. Minn. 1976)..... 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Butler, 297 U.S. 1 (1936) 12

United States v. Holt State Bank, 270 U.S. 49 (1926) 6

FEDERAL CONSTITUTION, STATUTES AND REGULATIONS

U. S. Const. Art. IV, § 3, cl. 2 8

U.S. Const. Tenth Amendment 15

Public Law (91-661) 3

40 U.S.C. § 255 ..... 9, 10

Everglades National Park 16 U.S.C. §§ 410(u) and 410(rl) 9

Act of January 8, 1971 (84 Stat. 1971) 3

Isle Royale National Park, 16 U.S.C. § 408(g) 9

Representative Blatnik in 1969 (H.R. No. 10482) 2

36 C.F.R. § 5.3 4

STATE CONSTITUTION, STATUTES AND RULES

Minn. Laws 1891, Resolution 13 2

Minn. Laws 1971, Chapter 852 13

Minn. Laws 1995, Chapter 124, Sec. 2 ii

Minn. Stat. § 84B.06 13

Minn. Stat. § 84B.061 ..... i, 7, 15

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS AUTHORITIES

The Federalist No. 39 (C. Rossiter ed. 1961)..... 17

Webster-Ashburton Treaty (proclaimed November 10, 1842) ii

Root-Bryce Treaty (proclaimed May 14, 1910)..... ii

Federal Register, Vol. 40, No. 68, at 15921-22..... 3

INTEREST OF AMICI

The State of Minnesota supports the Petition for Writ of Certiorari. This case involves issues of sovereignty that are of fundamental concern to the State. The lower court rulings are based on a judicially created doctrine of "tantamount cession" that provides for cession, by judicial implication, of a state's jurisdiction over state-owned navigable waters. This doctrine was applied to the present facts where the State of Minnesota donated over 34,000 acres of state-owned land, at a cost to the State in excess of $5 million, to the federal government to establish a national park. The State, however, did not donate state-owned navigable waters adjacent to the donated land and did not expressly cede any jurisdiction over those waters to the federal government. The ruling of the lower court conflicts with established precedent of this Court and seriously erodes a fundamental aspect of state sovereignty. In the absence of express state cession of jurisdiction and federal acceptance of jurisdiction, the lower court ruling provides the National Park Service with a basis for regulatory jurisdiction through erroneous interpretation of the United States Constitution's Property Clause. The State's ability to maintain its jurisdiction and its regulatory control over vital state resources associated with these navigable waters has been wrongfully taken away.

STATEMENT OF FACTS

A. The Establishment of Voyageurs National Park.

The concept of Voyageurs National Park dates back to 1891 when the Minnesota Legislature requested that the President of the United States establish a national park in the area of Minnesota between Crane Lake on the east and Lake of the Woods on the West. (Minn. General Laws 1891, Resolution 13). Progress was slow. The request was considered, but no meaningful action was taken until 1960 when the State asked the National Park Service to study the possibility of establishing a park within the area initially considered. The Department of Interior made a recommendation for creation of a park in 1964. A bill authorizing the establishment of such a park was introduced in Congress in 1968 by Minnesota Congressman John Blatnik. The bill was introduced too late for consideration in that session of Congress and Congressman Blatnik re-introduced a revised version of the bill in 1969.[2]

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[2] The bill introduced by Representative Blatnik in 1969 (H. R. No. 10482) authorized continuance of resorts in the proposed national park area; seaplane, motorboat, houseboat, and snowmobile use; limited timber harvesting; and public hunting. Limited timber harvesting and public hunting were amended out of the bill before passage. The bill, as introduced, reflected concerns arising from the United States Forest Service Administration of the Boundary Waters Canoe Area or "B.W.C.A." (located directly East of the proposed Voyageurs National Park), where resorts and airplanes were banned, motorboats restricted, and where existing restrictions on logging and snowmobiling were being further tightened. Blatnik's Eighth Minnesota Congressional District included all of the BWCA and most, if not all, of proposed Voyageurs

Finally, on January 8, 1971, Voyageurs National Park (hereinafter referred to as "VNP" or the "Park") was authorized by an Act of Congress (Public Law 91-661). The Act required the State to donate state land and other publicly-owned land for the Park. The Act did not require the donation of any interests in state-owned waters or their beds.

In June 1971, the Minnesota legislature passed an act authorizing land transfers to the United States for creation of the Park at a cost in excess of $5 million to the State. The transfer of 35,235 acres of state land was completed in 1975, fulfilling the requirements of Public Law 91-661. The National Park Service accepted transfer of these lands and the Secretary of Interior officially established VNP on April 8, 1975.[3]

National Park. His 1969 Voyageurs National Park Bill did not amount to a westerly extension of the Boundary Waters Canoe Area for obvious reasons.

[3] The Secretary of Interior's "Notice of Establishment of Voyageurs National Park, Minnesota was published on April 8, 1975 in the Federal Register (Vol. 40, No. 68, at 15921-22). It refers only to land, as follows:

> Whereas more than 34,000 acres of land, including all the land required to be donated by the State of Minnesota, are now under the ownership of the United States and under the administrative jurisdiction of the National Park Service within the boundaries of Voyageurs National Park, as the boundaries are set forth in section 102 of the Act of January 8, 1971 (84 Stat. 1971), and the acreage so required, in my opinion, is efficiently administratable to carry out the purposes of such Act.
>
> Now, therefore, I, Rogers C. Morton, Secretary of the Interior, hereby give notice of the establishment of

Within the Park boundaries there are approximately 139,000 acres of land, one-quarter of which was donated by the State of Minnesota, and 80,000 acres of navigable water, all of which is owned by the State and none of which was donated for the Park. The State of Minnesota donated the land necessary to bring VNP to reality and supported the establishment of the Park. However, the State of Minnesota never intended, nor did it effectuate, the transfer of any navigable waters to the federal government in connection with the establishment of VNP.

B. The Present Dispute.

The present case involves a challenge by Carl E. Brown and Harold "Bo" Armstrong to the National Park Service's ("NPS") jurisdiction over waters within VNP owned by the State of Minnesota. On August 10, 1996, Petitioners were stopped by NPS representatives while operating a boat with paying passengers aboard and traveling through Minnesota waters that are included within the exterior boundaries of the Park. Petitioners were cited for violating 36 C.F.R. § 5.3, which provides:

> Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be

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Voyageurs National Park, such establishment to become effective on April 8, 1975.

The notice then continues with legal descriptions of the lands involved, including islands, but not the waters surrounding the islands.

> specifically authorized under special regulations applicable to a park area, is prohibited.

Petitioners were found guilty of violating the above regulation by a U. S. Magistrate Judge. That ruling was affirmed by the district court on January 5, 1999. Petitioners sought review before the Eighth Circuit Court of Appeals. The district court's ruling was affirmed on July 28, 1999. *See United States of America v. Harold M. Armstrong and Carl E. Brown,* 186 F.3rd 1055 (8th Cir. 1999). Petition for Rehearing was denied on September 10, 1999.

Minnesota's retention of its sovereign interests in the navigable waters of VNP precludes any assertion of jurisdiction by the federal government over those waters. Those same sovereign interests of the State preserve the rights of citizens to travel on and make use of the surface waters consistent with the laws of the State. Petitioners in this case were not violating State law and, to the contrary, had considerable expectation that the sovereign state interests they were relying on provided a legal basis for boating across State waters.

REASONS FOR GRANTING THE WRIT

I. Important Issues Of State Sovereignty Regarding Jurisdiction Over Navigable Waters Are Raised In This Case.

A. Jurisdiction Over Navigable Waters Is A Fundamental Aspect Of State Sovereignty.

This Court from an early date has acknowledged that, at the time of independence, the people of each of the Thirteen Colonies "became themselves sovereign, and

in that character hold the absolute right to all their navigable waters and the soils under them for their own common use . . . " *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842). In *Lessee of Pollard v. Hagan*, 3 How. 212 (1845), this Court concluded that states entering the Union after 1789 did so on an "equal footing" with the original states and so have similar ownership over these "sovereign lands." *Id.*, at 228-229. This Court has also held that in consequence of this rule, a State's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The rulings of this Court evidence the importance of state sovereignty over navigable waters. Accordingly, any threat to the State of Minnesota's jurisdiction over the waters at issue here strikes at the very heart of the rights and authorities guaranteed to the State when it came into the Union.

B. Title To The Land And Navigable Water Vested In The State At Statehood.

The State of Minnesota was admitted into the Union in 1858. As noted above, upon its admission to the Union, the State took ownership and possession of the lands and waters within its territory on equal footing with other states of the Union. *See United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Therefore, title to the waters and the beds of navigable waters, unless previously reserved or otherwise disposed of by the federal government,

passed to the State upon its admission to the Union.[4] Minnesota reiterated these fundamental principles by the enactment in 1995 of Minnesota Statutes, Sections 1.0451 and 84B.061, *supra,* wherein the legislature directed state officials to protect state sovereign interests associated with these waters. The principle that underlies the equal footing doctrine and state ownership is that navigable waters uniquely involve sovereign interests rooted in English common law tracing back to the Magna Carta. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 283 (1997). The State's ownership of navigable waters within the exterior boundaries of Voyageurs National Park was affirmed by the lower court in *United States v. Brown,* 552 F.2d 817, 820 n. 3 (8th Cir. 1977) (*Brown I*).

None of the parties in this case, including the federal government, dispute Minnesota's ownership of the navigable water and the beds beneath them in what is now VNP. What is disputed is whether Minnesota has ceded its jurisdiction over waters to the federal government when the Park was established. The opinion below affirmed the Eighth Circuit's holding in *Brown I, supra,* that Minnesota's participation in the establishment of Voyageurs National Park was "tantamount to a cession of jurisdiction over the lands and waters within the park boundaries." *Id.* 552 F.2d at 821. The holding by the lower court is directly contrary to this Court's precedent recognizing that ownership of navigable waters is a vital aspect of state sovereignty. Such a fundamental aspect of

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[4] The navigable waters at issue here were not previously reserved or otherwise disposed of by the federal government prior to Minnesota's admission into the Union.

state sovereignty should not be permitted to be eliminated on the basis of mere implication.

C. Absent State Donation Of Its Interests In Waters Within The Exterior Boundaries Of Voyageurs National Park, Exercise Of Jurisdiction Over These Waters By The National Park Service Has No Foundation In The Property Clause Of The United States Constitution.

The Property Clause of the United States Constitution empowers the United States to enact regulatory legislation protecting federal lands from interference. It provides that "Congress shall have the power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States." U. S. Const. Art. IV, § 3, cl. 2. As stated earlier, the State's ownership of the navigable waters and their beds located within the boundaries of VNP is not disputed by any of the parties. As a consequence, the lower court's holding that the National Park Service's jurisdiction over these waters could be based on the Property Clause is without constitutional foundation and is contrary to the following decisions of this Court.

In *Colorado v. Toll*, 268 U.S. 228 (1925), the National Park Service attempted to regulate the use of automobiles that carried paying passengers on Colorado state highways. Colorado argued that jurisdiction over state and county highways passing through Rocky Mountain National Park had not been ceded to the federal government. In reviewing the Act establishing Rocky Mountain National Park, this Court in *Toll* ruled that:

> There is no attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of State over the roads are left unaffected in terms. Apart from those terms the state denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government.

Id., 268 U.S. at 231.

In the present case, Congress did not require a donation of state-owned water or sovereignty in connection with the establishment of the Park, nor did it provide for an exclusive grant of jurisdiction for the National Park Service to regulate navigable waters. This is particularly significant when considering that Congress *did* require such donation or sovereignty, with the cooperation of the states involved, in connection with the establishment of other national parks such as Isle Royale National Park, 16 U.S.C. § 408(g), and Everglades National Park 16 U.S.C. §§ 410(u) and 410(r-l).

Not only was a donation of state-owned navigable waters or a grant of jurisdiction to the federal government conspicuously absent from the Act establishing VNP, the State never ceded jurisdiction and the federal government never accepted jurisdiction over the waters. In this regard, pursuant to 40 U.S.C. § 255, the federal government is required to formally acknowledge that consent has been given by a state to relinquish jurisdiction and that the United States has agreed to accept jurisdiction.

Section 255 specifically provides that a notice of acceptance is to be filed with the Governor of the State

where the lands are located and that unless or until the United States accepts jurisdiction, it shall be conclusively presumed that no jurisdiction has been accepted. *See Adams v. United States*, 319 U.S. 312 (1943). In *Adams*, recognition of federal jurisdiction over a crime committed within Camp Clairborne, Louisiana was denied. This Court upheld the requirements of 40 U.S.C. § 255 and ruled that "since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of the proceedings." *Id.*, 319 U.S. at 315.

Similar to *Adams*, none of the requirements of § 255 have been met regarding the National Park Service's claimed jurisdiction over the navigable waters in VNP. Without clear cession by the State and acceptance by the United States, the State retains its jurisdiction. The waterways in VNP are equivalent to the roadways in *Toll*. Moreover, given the ruling in *Toll*, there is no basis for the judicially-created doctrine of "implied" or "tantamount cession" to support National Park Service jurisdiction to regulate Minnesota waters.

Before *Toll*, in *Kansas v. Colorado*, 206 U.S. 46 (1907), the federal government made virtually the same Property Clause argument that is being made by the government in this case. At issue in *Kansas* was the jurisdiction over state-owned waters adjacent to federally-owned lands. This Court rejected the federal government's argument that the Property Clause power extended federal authority beyond federal land to include waters owned by the state. In *Kansas*, this Court held that the power of the United States to regulate property within a state is limited to the property actually owned by the United States.

Id., 206 U.S. at 89. The *Toll* and *Kansas* decisions are in direct conflict with the lower court's ruling in this case. To resolve this conflict, the Petition for Certiorari must be granted.

The Eighth Circuit Court cited *Kleppe v. New Mexico*, 426 U.S. 529 (1976), as relied upon in *Brown I*,[5] in support of its ruling. *Kleppe* involved a narrow question of whether the power to regulate provided by the Property Clause extended to protection of wildlife on federally-owned land. No state land or water was involved in *Kleppe*. Accordingly, the decision there cannot be construed to support the lower court's ruling that National Park Service jurisdiction extends beyond federal land to include state-owned lands and waters. The ruling in *Kleppe* did not expand the government's Property Clause power. To do so, this Court must limit or overrule its decisions in *Toll* and *Kansas*.

The court below also relied on its ruling in *Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) to support its holding. *Block*, however, arose under entirely different circumstances. In *Block*, federal regulations regarding motorized

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[5] The holding in *Brown I*, did not contemplate the facts of the current case. In *Brown I*, both the district court and the court of appeals based their rulings in part on the direct impact that waterfowl hunting as an activity would have on immediately adjacent federally-owned lands. Accordingly, because waterfowl hunting on state waters could have an impact on adjacent federally-owned lands, the courts concluded that the National Park Service may regulate such activity. The current case does not involve shotgun pellets falling on federally-owned lands, as did *Brown I*.

boats were upheld because the court determined that Congress specifically authorized those regulations.

State jurisdiction over the waters within VNP, on the other hand, was recognized by the federal government when it established the Park in 1975 based upon Minnesota's donation of land, alone, for the Park.[6] State jurisdiction is consistent with Supreme Court precedent as well. As discussed above, the Supreme Court's holdings in *Kansas* and *Toll* have not been limited or overturned.

The Property Clause of the Constitution does not extend to state-owned navigable waters simply because they are adjacent to federal lands. Viewed charitably, the federal takeover of state-owned waters may be explained as a neat, tidy, and efficient way for a federal agency to discharge its perceived duties, without the complications of involving the owner of the property being regulated. However, this Court has made it abundantly clear that it does not share that view. In *New York v. United States*, 505 U.S. 144 (1992), this Court stated:

> The question is not what power the federal government ought to have but what powers in fact have been given by the people. *United States v. Butler*, 297 U.S. 1, 63 (1936).

505 U.S. at 157.

The lower court ruling conflicts with well-established constitutional principles and precedent set by this Court.

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[6] This was also recognized by the district court in *United States v. Brown*, 431 F. Supp. 56, 59 (D. Minn. 1976) where it held that the State had not ceded jurisdiction over the waters when the Park was established.

Accordingly, the Court should reverse the lower court's decision and restore Minnesota's constitutionally guaranteed sovereign rights.

D. The State Has Not Ceded Jurisdiction Over Waters In The Park.

Within its boundaries, the State holds the navigable waters and lands beneath them in trust for the benefit of the citizens of Minnesota. The State has consistently maintained that ownership of navigable waters and their beds and the jurisdiction over them is an important aspect of state sovereignty. In regard to these waters and their beds located within the exterior boundaries of VNP, Minnesota simply has not ceded jurisdiction and has consistently asserted its sovereign rights as discussed below.

First, as important as it was to establish a national park within Minnesota, the State was only willing to donate and cede jurisdiction over land to the federal government in connection with the establishment of VNP. (Minn. Stat. § 84B.06). The State's intent is clearly demonstrated in the title and body of the State Act (Laws of 1971 Chapter 852)[7] authorizing donation of the state-owned

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[7] Title to Minn. Laws 1971, ch. 852, reads as follows:

"An act relating to Voyageurs National Park; authorizing the donation of state lands to the United States for the park; authorizing condemnation of state trust fund lands and lands of political subdivisions located within the park boundaries; authorizing acquisition of unencumbered title to lands held in trust for taxing districts; authorizing the filing of

lands. Significantly, the word "water" does not appear in the title of the Act. Further, there is no mention of donation of state-owned navigable waters, no consent to federal acquisition of these waters, and no cession of state jurisdiction over these waters in the title or body of this law. (Petitioner Brown's Appendix at pp. 59-63). As stated by Robert Herbst, Minnesota's Commissioner of Natural Resources in his June 14, 1975, comments in *Response to the National Park Services' Proposed Master Plan and Environmental Impact Statement for the Park:* "While these waters are part of Voyageurs National Park, the water and beds are the sovereign right of the State of Minnesota, and these rights have not been transferred to the Federal Government. Only the land surface rights of the state public lands were transferred." (App. 3).

Second, the State's retention of these rights has been consistently asserted by the State after the establishment of the Park. In 1977 in *Brown I,* and in 1981 in *Alexander v. Block, supra,* the State denied any cession of interests in navigable waters in VNP and the BWCA. Both of these cases involved a different legal context than presented by the facts in this case, but both evidence the State's commitment and consistent effort to protect its jurisdiction over navigable waters in VNP.

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certain claims; consenting to federal land acquisition within the park; specifying powers and duties of public officials in relation thereto; appropriating money and authorizing the issuance and sale of state bonds for the acquisition of the lands within the park."

More recently, the State re-affirmed the retention of its rights and jurisdiction over navigable waters in VNP through the enactment of Minn. Stat. § 84B.061, *supra.* This statute demonstrates that ownership and jurisdiction over state-owned navigable waters and their beds located within Voyageurs National Park has never been ceded by the State either expressly or implicitly. In plain language, the State has eliminated the basis for judicial speculation that the 1971 state law donating state land for establishment of VNP was "tantamount to cession of state owned waters."

E. The State's Sovereign Interests In Waters Within Voyageurs National Park Are Protected By The Tenth Amendment.

The Tenth Amendment to the Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

The central issue before the lower court was whether the federal government through the National Park Service has a basis for regulatory jurisdiction on the waters of Voyageurs National Park. Discerning the proper division of authority between the federal government and one of its states is a question as old as the Constitution itself. *New York, supra,* 505 U.S. at 149. In *New York,* when examining the constitutionality of an Act of Congress regulating low level radioactive waste, this Court

reflected upon the relationship between the federal and state sovereigns and held:

> Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extra constitutional government with each issue of comparable gravity would, in the long run, be far worse.

Id. 505 U.S. 187-188.

The opinion below disregards the importance of state sovereign interests, sweeping aside state sovereignty on the basis of judicially created "implied cession" of the State's jurisdiction. The State's sovereignty cannot be set aside by the lower court either by judicial assumption that Minnesota waived its sovereignty as a mere cost of agreeing to have a national park in Minnesota or by judicial inference that state interests have been subordinated to broader federal interests. In focusing on the federal/state relationship this Court in *New York* held:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Id. If Congress intends to alter the usual constitutional balance between states and the federal government, it must make its intention unmistakably clear. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Tenth Amendment protects the sovereign interests retained by the State including its ownership and sovereign jurisdiction over navigable waters within VNP.

This Court's holding in *New York* has been the cornerstone of a wide range of cases where the federal government has impermissibly sought to impose regulatory programs on state governments. *See Printz v. United States*, 521 U.S. 898, 919 (1997). In *Printz*, provisions of the Brady Act commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers were held to be an unconstitutional imposition on state sovereignty.

The principles expounded in *New York* have also been recognized in cases where other important aspects of state sovereignty or sovereign immunity have been examined. *See Alden v. Maine*, ___ U.S. ___, 119 S. Ct. 2240, 2247 (1999) (provision of Federal Labor Standards Act purporting to authorize private actions against states in state

courts found unconstitutional); *College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd.*, ___ U. S.___, 119 S. Ct. 2219 (1999); (Florida's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State.) Through these decisions, this Court has steadfastly held to the premise that the Constitution established a system of "dual sovereignty" as a basic protection of liberty for the people. *Gregory v. Ashcroft, supra,* 501 U.S. at 457. The Constitution's structural protection of liberty requires that there be "a healthy balance of power between the states and the federal government that will reduce the risk of tyranny and abuse from either front." *Id.*, 501 U.S. at 458.

The opinion below seriously damaged the principles of federalism secured by the Constitution by setting aside a vital aspect of state sovereignty. The recent opinions of this Court demonstrate that state sovereignty cannot be implicitly abrogated or waived. Review must be granted to resolve the fundamental constitutional conflict created by the opinion below.

CONCLUSION

For the above reasons, the State of Minnesota respectfully requests that the Petition for Certiorari be granted.

Dated: February 2000

Respectfully submitted,

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COMMENTS ON VOYAGEURS NATIONAL PARK DRAFT MASTER PLAN AND EIS

(DEFENDANTS' TRIAL EXHIBIT "N")

APPENDIX

COMMENTS ON VOYAGEURS NATIONAL PARK DRAFT MASTER PLAN AND EIS

By Commissioner Robert L. Herbst
Department of Natural Resources
State of Minnesota

June 14, 1975

The Commissioner and staff of the Department of Natural Resources have reviewed the Draft Master Plan and Draft EIS on Voyageurs National Park and have several comments to offer which we hope will be of assistance in preparation of the final documents.

1. A major deficiency of the plan seems to be that it does not touch on the many issues relating to the surrounding area outside the park. The park will have a major influence on land use outside the park, but at the same time that land use will greatly affect visitor perceptions and attitudes as they approach the park and, ultimately, the park experience itself. Therefore, we believe the park cannot be planned without considering the periphery, including land use and development, accommodations for visitors, transportation and access, etc. Since this is a Park Service project, the Park Service has the responsibility for considering the inter-relationships between the park and the surrounding area. Such coordinated planning would also provide greater flexibility in the planning of the park itself. While we recognize that the National Park Service has no jurisdiction outside the park, the plan should be sensitive to the needs of the state and the area residents.

2. The plan is very broad in many respects. While a master plan admittedly cannot be too detailed, some

concerns are not discussed sufficiently to reveal what overall policy will be. An example is the matter of public accommodations – how much is needed and how will it be provided, etc., especially since there will be only primitive accommodations within the park.

3. The Park Service is to be complimented on its decision to review the plan at five-year intervals. Hopefully, this will provide the flexibility necessary to meet changing conditions. DNR will be happy to be of assistance in these periodic reviews, and we trust this process will also insure continuing public participation.

* * *

Another result of lack of forest disturbance will be a buildup of fuels, leading to the possibility of a catastrophic fire which could substantially destroy both facilities and esthetics. The absence of disturbance could also result in epidemic disease or insect infestations and the killing of large stands of timber. While these occurrences would result from natural processes, they would not really be natural, because in the totally uncontrolled ecosystem, natural fires of more frequent occurrence would have kept the dead and downed trees and other organic matter at levels which generally would not support catastrophic fires or disease or insect outbreaks. In this regard, it should also be noted that the use of pesticides will be limited by the large amount of water areas thereby making a sound vegetative management program of even greater importance.

13. As has been mentioned, the plan is very sketchy as to how visitors will be accommodated. Since there will be very few facilities within the park, consideration should be given in the plan to the accommodation of visitors outside the park. Information such as

the number of visitors, length of stay, travel routes and points of entry, etc., should be given to guide the private sector in the provision of visitor facilities, and the plan should outline how the Park Service will work with the private sector and other governmental agencies in coordinating the provision of facilities.

14. In regard to management of the waters within the park, the plan should clearly indicate that the state has statutory authority to maintain water levels on those lakes not controlled by the International Joint Commission. While these waters are part of Voyageurs National Park, the water and beds are the sovereign right of the State of Minnesota, and these rights have not been transferred to the Federal Government. Only the land surface rights of the state public lands were transferred.

    The Plan should also indicate that any control of surface use of lakes will be accomplished under the state's surface use zoning program, in accordance with DNR's statutory authority. Such regulations may well be necessary on the lakes, and if so, could be initiated by an appropriate request by the Park Service to the state to develop such a program.